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Katrina Jagodinsky
University of Nebraska-Lincoln, kjagodinsky@unl.edu

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INTRODUCTION

Into the Void, or the Musings and Confessions of a Redheaded Stepchild
Lost in Western Legal History and Found in the Legal Borderlands of the North American West

KATRINA JAGODINSKY

Borders are set up to define the places that are safe and unsafe, to distinguish us from them. A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary. It is in a constant state of transition. The prohibited and forbidden are its inhabitants. Los atravesados live here: the squint-eyed, the perverse, the queer, the troublesome, the mongrel, the mulato, the half-breed, the half dead; in short, those who cross over, pass over, or go through the confines of the “normal.”

Gloria Anzaldúa, Borderlands/La Frontera: The New Mestiza

Introducing the Introduction

Wet behind the ears at my first American Society for Legal History conference in 2014, I listened with rapt attention as keynote speaker Patty Limerick asked: “Is western history legal history?” Limerick answered in the affirmative, citing the many ways in which law had defined the North American West. By the time I heard Limerick speak in downtown Denver’s Tenth Circuit Court of Appeals, the wheels behind this anthology had already been set in motion, and I was excited to be working among historiographic heroes who have helped me to reflect upon my own engagement with legal history.
Those of us who teach Western history courses can count the legal acts Limerick recited on our fingers and toes: the 1784 Land Ordinance, the 1787 Northwest Ordinance, the 1790 Trade & Intercourse Act, the 1803 Louisiana Purchase, and every treaty between American Indians and the federal government on one hand; the Missouri Compromises of 1820 and 1850, the Oregon Treaties of 1818 and 1846, and the series of legal maneuvers from the 1819 Adams-Onis Treaty and Texas Independence to the US-Mexican War and the 1848 Treaty of Guadalupe Hidalgo on the other hand. With our fingers accounted for, we can look to our toes to remember the Indian Removal Act of 1830 that paved the way for the establishment of Indian Territory in 1834, California Statehood in 1850, and the Kansas-Nebraska Act of 1854, the Homestead and Pacific Railroad Acts of 1862, the Chinese Exclusion Act of 1882, the Allotment or Dawes Act of 1887, the 1898 Newlands Resolution incorporating the Territory of Hawaii, and every Organic Act that transformed a western territory into an American state between 1803 and 1958.

The following chapters add even more judicial and legislative acts of creation and destruction to this list, and together they stand as the basic framework of American laws shaping the past and present of the North American West as we know it. Pablo Mitchell and I, intrigued by this legal landscape and inspired by the works we read in histories of gender and sexuality, race and ethnicity, borderlands studies, and critical race theory, wanted to gather those we had seen working with such strands, and the Clements Center Symposium model seemed an ideal venue for our ambitions. We reached out to others we knew through Western and legal history and launched a conversation about our desire to showcase, and make more visible, the scholarly community working on the North American West. The legal borderlands model allowed us to share a conceptual framework while we sought to demonstrate the extent to which the North American West has been, and continues to be, a profound site of overlapping and overreaching legal structures and practices steeped in articulations of race, gender, and power.

As defined in a 2005 special issue of American Quarterly, legal borderlands are both those mandarin legal texts that define and regulate geopolitical borders and the ambiguities or contradictions creating liminal zones within the law. This concept seemed to us to be the most promising vehicle for applying the tenets of borderlands studies and critical race theory to Western legal histories. And so, the scholars in this volume have taken up
the legal borderlands banner, some finding the device remarkably useful in
deconstructing the tired and obstructive lawless West archetype, and others
straining the limits of its utility as they seek to explicate a region character-
ized by lawful disorder and contradiction.

Clearly, we agree with Limerick that Western history is legal history. And
yet, despite a number of important exceptions, Western legal history has
failed to deliver on the promise of this premise. In fact, the very question
Limerick posed in her 2014 address reveals that the divide between Western
and legal histories remains both institutional, as a problem of leadership and
membership, and intellectual, as a problem of unrealized potential. Oth-
ers likely have their own assessments of Western legal history as a field,
namely those who consider themselves its practitioners, but we contend
that the most powerful histories of law in the North American West cross
disciplinary and institutional boundaries and are as likely to be cultural or
conceptual as they are to be statutory and statistical. Even if our focus might
be on topics typical of Western legal history—federal Indian policy, water
and natural resource law, or immigration policy—we are scholars who pivot
our work toward the legal borderlands framework that originated in the
interdisciplinary school of American studies.

Critical legal history, critical race theory, legal borderlands, and New
Western history are by now mature concepts that have not permeated the
Western legal history field. Critical works in Western legal history abound—
this essay and this volume will cite many of them—and yet, few of those
authors describe their work as critical or even as Western legal history. For
wayfaring scholars seeking an intellectual community, this contradiction
makes it difficult to assert or claim an academic identity.

This essay is a redhead's intellectual autobiography disguised
as historiography; a set of questions passing as answers that reveal the void
in Western legal history. If you haven't thought about Western legal history
much lately, or you can't quite put your finger on a Western legal historian,
then you, too, have found the void. If you are a reader fully content with
Western legal history, well, pull your boots on. My own disappointment
with the scholarship branded as Western legal history sent me seeking solace
elsewhere and through that journey, I came to legal borderlands. In sharing
my own conversion story here, I am calling out to a community of intel-
lectual pushers and pullers; of angry and empathetic scholars; of those who
explore history, and the law, and the West, and are as often disturbed as
they are enchanted. Collectively, we invite readers to join a field of border
crossers following the lead of Gloria Anzaldúa and Patricia Limerick, re-
claiming the freckles and bruises of scholarship not fully sponsored in West-
er or legal history, often inspired by New Western and borderlands history, 
but somehow still its own.

It All Started Somewhere: The Legacy of Borderlands Crossed in 1987

Enjoying Limerick’s 2014 American Society for Legal History address in 
the US district courtroom reminded me of my own family history of court-
room appearances ranging from felony and misdemeanor charges to mar-
riage ceremonies and custody disputes. I had only recently been hired at the 
University of Nebraska–Lincoln and still navigated the academy without 
grace, often feeling keenly the “emotional residue” of passing beyond the 
borders of my class. Securing my place in Limerick’s audience, where I 
remained unsure whether I was “us” or “them,” required the generosity of 
my mentors and the characteristic stubbornness and spite my fellow gingers 
often disclaim. Limerick’s words also took me back to my simultaneous 
reading in 2001 of Legacy of Conquest and Borderlands/La Frontera during 
undergraduate studies at Lawrence University. Although I didn’t read their 
foundational works until nearly fifteen years after their publication, I felt 
immediately each author’s significance.3

Only seven years old when Borderlands/LaFrontera and Legacy of Con-
quest came out in 1987, I watched the country fly by out the window of 
an old, wood-paneled station wagon my mother had fondly named “Big 
Beauty,” as she and her boyfriend, a Vietnam veteran turned vegan, drove 
us from my San Diego, California, birthplace to Tigerton, Wisconsin. When 
I read Limerick’s work more than a decade later, her inclusion of personal 
recollections of a changing West throughout her essays spoke to me deeply. 
Crossing natural and unnatural borders as we drove from California to Wis-
consin, we trespassed unknowingly on the Hopi reservation and instead of 
being evicted we were invited to stay for a rodeo that remains the only one 
I’ve ever attended. In Arkansas, I found the accents as difficult to decipher 
as the Jamaican antiapartheid anthems I heard on my mother’s reggae rec-
ords. As the people we encountered seemed simultaneously more and less 
like me, I learned that whiteness meant something different depending on 
the demographic ratio of the room, the county, the state. When we arrived
in Wisconsin and I started second grade that fall, it was a shock to see only white children on the playground and hear only English spoken in the classroom in contrast to the San Diego daycare and grade schools I had attended. Although I could not express it at the time, I felt that a great violence had occurred and feared that outsiders—myself included—did not last long in that place. That we had moved to a town familiar to my mother and lived among family and friends helped to ease my fears, certainly, but the eerie feeling of transgression never left me, nor did my habit of questioning a shared identity based on skin color alone. Anzaldúa’s simultaneous critique and defense of the community who raised her was intimately recognizable to me as an uneasy member of a rural and white majority who turned on its own most vulnerable as often as it targeted others. Without collapsing the stark and powerful distinctions between La Frontera and the Great Lakes, between being teased about red hair and being teased about red skin, my childhood of constant transition and feeling more mongrel than normal made me particularly receptive to Anzaldúa and other anticolonial writers of color then and now.

More than the shared experience of observing national histories through a personal lens, Limerick’s focus on the ongoing twentieth-century debate over nineteenth-century Western expansion as conquest or progress also resonated in the violent conflicts over mining and the “Wisconsin Walleye War” over off-reservation treaty rights that unfolded during my adolescence. Just as my mother had taken me to anti-death penalty vigils and feminist film festivals in San Diego, she brought me to Wa-Swa-Gon Treaty Association meetings to support Ojibwe spearfishers and their families, and to Green Party rallies to shout down Kennecott mining executives who touted job creation statistics and other economic incentives in northern Wisconsin. Although I attended public high school after Wisconsin Act 31 mandated that “schools are required to teach American Indian studies at least three times throughout a student’s K-12 career” and that the state provide instruction on American Indian treaty rights, the fact remained that the majority of my neighbors regularly and confidently expressed vehement epithets against Native people and treaty rights advocates—like myself and my family. Hearing taunts from poor and wealthy white neighbors alike, some of whom sent their children to the same school I attended, made it clear to me that inequality bore many faces well before I knew the terms decolonization and intersectionality. Finding myself en el otro lado more
often than not throughout my adolescence, I came early to the conclusion—Limerick and Anzaldúa’s, too—that we were living in the legacy of ongoing white and male conquest.

It is these experiences that I took with me when I enrolled at Lawrence University—a private liberal arts school in central Wisconsin—as a low-income student who benefited tremendously from the counseling and support of the Upward Bound program. Perhaps not surprisingly, I also took with me a keenly honed sense of inadequacy and self-loathing that first-generation students and redheaded stepchildren seem to exude in abundance. A few hard knocks made it clear that I did not have the patience or persistence required of biology majors, and I too easily overindulged in the navel-gazing English majors can be known for, eventually making my way into the history department as a junior with a mediocre GPA, a smart mouth, and a few bad habits. Although I had seen firsthand the work of anticolonial activists in southern California and northern Wisconsin, I did not know that I had already been traversing legal borderlands and training with experts in decolonization and hybridity until I began to read the literary works of Paula Gunn Allen, Gloria Anzaldúa, and Joy Harjo alongside the classic postcolonial and postmodernist works of Judith Butler, Jacques Derrida, Frantz Fanon, Michel Foucault, Clifford Geertz, and Antonio Gramsci, while taking notes on remarkably compelling lectures in American history from Jerald Podair, an advisor who had already enjoyed a career in law. Even as my undergraduate mentors in history and English patiently taught me how to read and write critically, opening a world to me that I had never imagined, it was an internship at the D’Arcy McNickle Center for American Indian and Indigenous Studies at the Newberry Library in Chicago that would direct my subsequent academic trajectory. From the staff there, I learned that American Indian studies was its own field, an interdisciplinary mecca, and I began reading all that I could to prepare myself for graduate applications, starting with Vine Deloria Jr.’s critiques of academic and historical colonialism and Ward Churchill’s (pre-ethnic fraud controversy, mind you) portrayal of Indigenous rights claims in the larger frame of the civil rights movement.

This largely haphazard pursuit to become quickly acquainted with anticolonial Western histories is how I came to read both Borderlands/La Frontera and The Legacy of Conquest in 2001. Like Limerick’s critique of Western history, Gloria Anzaldúa’s prose took me back to the 1987 road trip that pulled me out of the US-Mexico borderlands and landed me squarely
in the Great Lakes borderlands that starkly divided Native and non-Native. More so than Limerick's historical essays, Anzaldúa's personal narrative echoed my own intimate encounters with white male supremacy and sexual intimidation. Repeatedly throughout my childhood and adolescence I had seen domestic violence and social stigma used to silence women who spoke out against interpersonal, political, and racial inequalities. Seeing how these methods of sexual and racial dominance worked in my own life made me an avid reader of scholars who recounted and challenged similar patterns in their own personal and national histories. With this frame of mind and overlapping interests in Western history, feminist narratives, and federal Indian law, it was only a matter of time before I would encounter the work of Robert A. Williams.6

The Western historians reading this essay need no introduction to Patricia Limerick, and if they are lucky, they also need no introduction to Robert A. Williams and his stunning work on the foundational anti-Indian tenets of colonial-era diplomacy and early American democracy. To be honest, I don’t remember now which of his works I read first, but I read fast and deep. His searing revelations of racism embedded within the construction of American legal ideology stunned me. Williams's work also led me to David Wilkins, who, like Gramsci and other critical scholars following his legacy, emphasized that the law created confusion and violence in the North American West rather than resolving lawlessness or disorder.7 Seeing these authors as part of a community of scholars writing Western legal history because I did not yet know the parameters of that field, I applied their work to my understandings of history, law, and the West as I looked for graduate schools, still unaware that my dependence on books and teachers as an escape from the poverty and dysfunction I grew up in were characteristic of my class.

Where It Went from There: Sore Thumbs and Ivory Towers in Indian Country

Given the directions my undergraduate readings had gone, it is perhaps no surprise, then, that I would apply for graduate school at the University of Arizona, where Williams teaches Federal Indian Law and Critical Race Theory, and where I would get to work with K. Tsianina Lomawaima and Luci Tapahonso in the American Indian Studies program that Vine Deloria Jr. built. I read Sherman Alexie’s “Unauthorized Autobiography of Me” in
the first semester of that program. To Alexie’s questions, “Have you stood in a crowded room where nobody looks like you? If you are white, have you stood in a room full of black people?” I could not only answer “yes,” I could also answer that I had sometimes found white faces frightening. I also read Joy Harjo’s work that first semester and found tremendous truth and comfort in her claim that “the world begins at a kitchen table.” Harjo’s lyric verses, blended with Anzaldúa and Limerick’s borderlands and wests, affirmed the importance of women’s intellectual and intimate configurations of the past.

Imagining myself part of their literary community, I sought classrooms and kitchen tables where I stuck out like a sore thumb because I had more often heard the truth about oppression and power spoken there. Fifteen years after moving from California to Wisconsin, I had returned to the Southwest, where I was grateful to hear Spanish and Diné more often than the epithets I heard so often in the Midwest.

Even amid such accomplished scholars and mentors at the University of Arizona, I had a long way to go before I could fully appreciate the depth and breadth of legal borderlands. Despite my early childhood in San Diego, which included frequent trips to Tijuana with my Spanish-speaking mother, fifteen years in rural Wisconsin had convinced me that border towns were those that surrounded tribal reservations as well as those divided by international boundaries. I had crossed borders onto reservations regularly, becoming well acquainted with the especially heightened and visible anti-Indian racism that slowly faded, but never fully disappeared, further away from tribal lands. Two additional years in an American Indian studies program reinforced my perception that Indian Country is in fact North America’s largest internal borderland—extending beyond the United States into Canada and Mexico.

My graduate training in American Indian studies also emphasized the important shift from postcolonial critiques to decolonizing methods, a conceptual and practical reorientation that borrows from postcolonial scholarship and history but insists that nation-states like the United States have yet to abandon colonial strategies in an effort to deny Indigenous autonomy. Readers ought to recognize the vital interventions of scholars like Linda Tuhiwai Smith and those who came after her, but I also found deeper appreciation for the work of poets like Paula Gunn Allen, who theorized the woman-centered politics in Indigenous communities I had known as a child; Joy Harjo, who marked the continuum between historical and
contemporary struggles and values among Native people; and Simon Ortiz, who described the powerful ruptures marked by reservation boundaries. Because American Indian studies is an interdisciplinary program, I read these literary works alongside the critical histories of Thomas Biolsi, whose work singled out the heightened racism along reservation borders that I had personally observed, and Keith Basso, who highlighted the unequal power dynamics between Indigenous and academic histories. K. Tsianina Lomawaima’s studies of federal Indian education policy underscored the importance of empathy and scrutiny when reading colonial archives, while Devon Mihesuah’s broad range of scholarship made clear the importance of Native women’s contributions to anticolonial knowledge in the past and present and warned against broad generalizations that mask the peculiarities of individual experience.11

I finished the master’s program ready to spread the twinned gospels of decolonization and peoplehood, but only to the choir, and it had not yet fully occurred to me just how poorly I fit in, in some parts of both Indian Country and the ivory tower, neither “us” nor “them” in either place. Less out of place then among Indians than elsewhere, I began designing and teaching American Indian studies courses at Tohono O’odham Community College, an hour outside of Tucson. For two years, I enjoyed multilingual classrooms and shared committee meetings run by tribal elders. In this environment, there was no dividing line between academic and activist history, and the courses I taught remained interdisciplinary, so I had little cause to think about the boundaries between fields that other graduates of a master’s program might more readily have identified. Instead, I thought almost constantly about the politics and optics of my role as a redheaded stepchild teaching American Indian studies in a tribal college. Thrilled, but also daunted, by the opportunity to teach anticolonial histories and methods among such a receptive audience of students and colleagues, many of whom had been living decolonization before they read about it, certain moments marked me indelibly. Listening to women talk about the networks they had built, and had sometimes seen torn down, to protect themselves and one another from border-crossing abusers made it impossible for me to separate violence from the law. Being pressed by an elder to define sovereignty in local terms made it obvious that such terms and concepts must be interrogated to ensure that they hold real, rather than merely rhetorical, power. Hosting decolonization and Native feminism workshops with tribal speakers who are now faculty on a variety of campuses made it clear that I had missed an
important lesson addressed in Gloria Anzaldúa’s invitation to white allies: I was trying to help when I should have been following.

Many women and men of color do not want to have any dealings with white people. . . . Many feel that whites should help their own people rid themselves of race hatred and fear first. I, for one, choose to use some of my energy to serve as mediator. I think we need to allow whites to be our allies. Through our literature, art, corridos, and folktales we must share our history with them so when they set up committees to help Big Mountain Navajos or the Chicano farmworkers or los Nicaraguanos they won’t turn people away because of their racial fears and ignorances. They will come to see that they are not helping us but following our lead.12

What does this journey through the ivory towers of Indian Country have to do with legal borderlands of the North American West? With Anzaldúa or Limerick or any of the chapters that follow? They are, collectively, what sent me back into the ivory tower, back into graduate school. Because I knew that my role was not to occupy a position at the front of a room full of Indians, inverting the experiences Alexie describes in “The Unauthorized Autobiography of Me,” but to do the work Anzaldúa described, not only following the lead of queer and critical scholars like her but also learning how to speak to my own people and join the legacy of door-busting Western historians like Patricia Limerick. In many ways, it was a painful decision to leave TOCC and the American Indian studies discipline, but it brought me to a new community of scholars who had already been working at the intersections of New Western history, critical legal studies, and borderlands for nearly two decades.

Not quite sure what I was getting myself into, I applied to the history PhD program at the University of Arizona, intending to train in Western history and write a dissertation about Native women. I began coursework in 2006 as an unfunded student. Coming in without the stamp of approval that a funding package provided reinforced my sense that I was somehow outside the fold. Despite my uneasy feeling, I failed to realize that this gesture communicated the department’s utter lack of confidence in my prospects and proceeded with the confidence of someone accustomed to uneasy feelings. Some readers know that this is a common experience for today’s first-generation graduate students. In the American Indian studies program my status as first-generation and unfunded was not unique; in a history
PhD program, the differences felt more obvious. Already inclined to read and write histories that called attention to unequal power dynamics, I now felt very keenly that I also engaged such inequalities through my own position within academia. Sensitive to the politics of the archives, classrooms, and texts that I navigated throughout the doctoral program, I came to rely heavily on my dissertation committee—all of whom navigated their own set of politics in the academy—and the scholarship of other border-crossing historians.

My doctoral training gave me the benefit of reading a broad array of the rich histories of the West spurred by both the New Western and borderlands history movements of the late 1980s and the critical turn in legal history of the same era. Unmistakably, my earlier concentration in federal Indian law, history of Indian education, and Native literature framed my view of borderlands, history, and law in the North American West. As it became clear that my dissertation would be a legal history of Native women in the North American West and would bear the imprint of scholars like Anzaldúa, Limerick, and Williams, my wise advisor Roger Nichols pointed out that I had better start reading Western legal history in earnest, and not just by accident or whim. Somehow, I still managed to get lost on the way there.

What is obvious to some is not always obvious to me, and so for quite some time after this initial directive from my advisor I thought I was reading Western legal history when in fact I was not. To me, Western legal history simply meant a historical focus on law in the North American West, so the scholars I read first were in fact critical legal scholars, critical race theorists, or the colleagues and descendants of Limerick and the New Western history school. Even when I read the work of Native feminists critiquing the law, it seemed like Western legal history to me. As I made my way through the doctoral program between 2006 and 2011, I took up the readings in borderlands, legal, and Western history that my coursework and research required. Although I often read them out of order, sometimes for teaching and sometimes for research, occasionally for pleasure and usually under pressure, I began noting gulfs in the field the way you can feel but not name the rifts among relatives at a family reunion.

First, There Was New Western History

Limerick displayed a particular sort of redheadedness when she rejected the influence of Frederick Jackson Turner’s frontier thesis—a teleological,
but also strangely pessimistic and nostalgic, ethnocentric narrative of Eu-
ropeans becoming American as they likewise transformed Western wilder-
ness into civilized communities—that had permeated histories of the North
American West since he first offered it in 1893. Limerick called for a reori-
entation of the field in *Legacy of Conquest* and distilled a growing sentiment
among her colleagues and students who acknowledged the histories of con-
quest and dispossession that Turner’s progress narrative obscured. Limer-
ick asked Western historians to reconsider what was significant, distinctive,
even exceptional about the North American West without borrowing Turn-
er’s answer that white, masculine, and agrarian progress characterized the
Western past. She and her New Western history cohort launched a genera-
ton of scholarship that challenged assumptions about progress and destiny,
inviting critical insights from Western history’s many subfields that have
repopulated the North American West with histories of Native and new-
comer; male, female, and transgender; multilingual and illiterate; working
class and robber-baron.

It is the framers and descendants of the New Western school of thought
who also included legal analysis in the histories that I read voraciously dur-
ing doctoral coursework and dissertation research. In addition to those
already mentioned and some who appear in this volume, Brad Asher, Tim-
othy Braatz, James Brooks, Sarah Carter, Miroslava Chávez-Gardia, Ev-
elyn Nakano Glenn, Laura Gómez, Linda Gordon, Karl Jacoby, Martha
Menchaca, Adele Perry, and Vicki Ruiz all published studies that revealed
the hegemonic idiosyncracies of the law in the borderlands of the North
American West in ways that squarely turned the Turnerian West on its head
and were, to me, quite obviously Western legal histories. Of course the
list here is incomplete, but it is representative of a wave of scholarship that
highlighted legal forms of violence, subjugation, and displacement through
a shared focus on race and gender in North American borderlands. They
are the studies that Sarah Deer and Jeff Shepherd’s chapters in this volume
build on to consider Indigenous women’s sexual vulnerability and Black-
foot bordercrossers’ criminality. They are the scholars who give context
to the racialized distribution of land and resources that Dana Weiner, Tom
Romero, and Brian Frehner refer to in their chapters on black Californians’
quest for citizenship and land rights, on concerns over the tandem restric-
tion of immigration and water in Colorado, and on resource extraction
among Oklahoma Choctaw and Chickasaws.

The hitch is that I followed the footnotes to critical race theory before
continuing into Western legal or even borderlands history, and like so many others before me who had personally encountered inequality, I was converted. As I sought opportunities to hear these scholars present at historical conferences and read more into their intellectual genealogies, it slowly became clear to me that none of them claimed a home in Western legal history. What surprised and unsettled me even more is that some of them only occasionally claim Western history as their home field. For a student struggling to define herself within academia, tracing the disciplinary bounds of cross-disciplinary scholars proved both inspiring and fatiguing.

**Critical Race Meets the North American West**

With such praise already bestowed on Robert A. Williams in this essay, and as the graduate of an interdisciplinary program focusing on race and ethnicity, it should come as no surprise that I would frame my view of the North American West through the lens of critical race theory (CRT). CRT offers two particular tenets that address professional encounters with law in the North American West and are directly expressed in the legal borderlands framework. First, and perhaps most obviously, CRT points to race, racism, and racialism as fundamental factors in the legal and historical articulations of power and authority in American society. Most social and legal historians whose work has evolved in the wake of the critical race school argue that race is a socially constructed and historically contingent category that has been and continues to be assigned value that works to justify or obscure inequality. Most elegantly stated by Richard Delgado and Jean Stefancic in their multiple editions of *Critical Race Theory: An Introduction*, this finding builds on the anticolonial scholarship of figures like Albert Memmi and Frantz Fanon, both crucial in linking the law to the assumption of race-based colonial and national power.¹⁵ CRT theorists, especially in the interventions of Kimberlé Crenshaw, point to multiple identity platforms working to shape individual and communal encounters with hegemony and power through the concept of intersectionality, illustrating that religion, gender, and class (among other categories) have complicating effects on racial and ethnic identity and status. Second, in another innovation Crenshaw models forcefully in her introduction to the foundational anthology, CRT theorists insist on the use of storytelling and personal narratives to enhance analytical and scholarly studies of race, racism, and racialism.¹⁶ This very essay puts that method to use, as do many of the Western and borderlands
histories concerned with the work of decolonization and antiracism that are cited in these pages. Combined with the assumptions of critical legal scholars—many of whom today simply regard themselves as good legal historians rather than a subgroup within the field—CRT tenets focusing on the omnipresence of racialized laws governing inequality, as well as the importance of critical storytelling as an analytical framework, are fundamental components of the legal borderlands frame put forward in the essays compiled in the 2005 special issue of *American Quarterly* and in this volume.\(^{17}\)

In the North American West and in many other regions, border makers and legislators have focused on racial and ethnic boundaries to justify division and dispossession with varying strategies, according, for instance, to the sexual, linguistic, and class orientations of borderlands dwellers. For this reason, a CRT view of the North American West has always seemed relatively straightforward to me, especially given my own experience with regional identity shifts over the course of my childhood and career. Anzaldúa’s poetic personal history of the political and cultural fault lines dividing the US-Mexico border is perhaps the most widely read and foremost example of an interdisciplinary application of critical race studies in the context of the North American West. In the thirty odd years since Anzaldúa’s volume, published in the same year as Limerick’s foundational work, many scholars have followed suit, historians and sociologists among them. Antonia Castañeda and Martha Menchaca wrote critical borderlands histories and historiographies of race and gender that applied critical race concepts to legal structures of inequality even if they didn’t focus exclusively on the law.\(^{18}\) Their intersectional models for interrogating race and gender in borderlands histories remain vital in my own conceptualization of legal borderlands and heavily influenced the critical stance of my own works.

Although they didn’t limit themselves to the US-Mexico borderlands, or even to the North American West, Ian Haney López, Evelyn Nakano Glenn, and Peggy Pascoe’s works on legalized racial inequality proved that combining critical race and critical legal precepts generated powerful legal histories.\(^{19}\) The studies by Ned Blackhawk, Katherine Benton Cohen, Grace Peña Delgado, Laura Gómez, Karl Jacoby, Pablo Mitchell, Nayan Shah, Jeffrey Shepherd, and Coll Thrush that followed did focus on the North American West explicitly and continued to reveal the legal structures—some more explicitly and critically than others—that shaped white and patriarchal supremacy over the course of the nineteenth and early twentieth centuries, exposing the important cultural, environmental, and legislative
work required to maintain racial and gender inequality in North American legal borderlands.\textsuperscript{22} With these authors keenly in mind, I continued to think Western legal history was a thriving intellectual home for scholars linking New Western and critical legal history to write about marginalized survivors of the legacies of conquest. Andrea Geiger’s chapter on Alaska Natives in territorial Alaskan courts, Kelly Lytle Hernández’s essay on the US Bureau of Prison’s peculiar treatment of Mexican border crossers, Allison Powers Useche’s study of the US-Mexico Claims Commission’s review of Mexican worker’s violent mistreatment, and Danielle Olden’s analysis of the fallibility of racial measures employed in Keyes \textit{v.} School District No. 1 are superb studies working in the wake of this literature.

Trained directly in Native, Western, and women’s history, but only tangentially in legal history, I entered into critical legal history as a field distinctive from CRT by accident. As I rounded out my dissertation reading, I saw through Peggy Pascoe’s work that histories of black women’s antebellum and reconstruction-era challenges to slavery and other forms of legal inequality might be more informative to my understanding of Native women’s nineteenth-century legal claims than the federal Indian law literature. The exciting trail of footnotes and additional graduate courses in comparative women’s history introduced me to Kathleen Brown, Laura Edwards, Ariela Gross, Linda Kerber, Tiya Miles, and Jennifer Morgan.\textsuperscript{21} These women’s antiracist legal scholarship stressed the CRT recognition that law served to uphold white male supremacy as they also chronicled black and Indigenous women’s resistance to such legal inequalities.

As I continued to pursue my own reading and scholarship, it became easy to link these works to those of Native feminists, the intellectual descendants of scholars I had read earlier in my master’s degree training. Luana Ross has written the most powerful summation of Native feminism I have ever read, and other scholars like Sarah Deer, Jennifer Denetdale, Mishuana Goeman, Dian Million, Audra Simpson, and Heidi Stark have demonstrated that colonialism operates in the present and past as a particularly gendered tool of dispossession and violence and that sovereignty, if perceived as a Western and imposed construct without regard to Indigenous forms of gender, law, and order, cannot resolve the problem of ongoing settler colonialism in North American and global contexts.\textsuperscript{22}

Reading each of these authors in conversation with one another, I imagined myself working within a very promising landscape of borderlands, critical, legal, and Western histories. All of these connections affirmed the
INTRODUCTION

earlier work of Antonia Castañeda and others demanding a “decolonization of western women’s history,” and so I continued to read and write with a fool’s confidence. Daft enough to assume I’d been reading Western legal history while enjoying the works cited above, I had to admit with embarrassment that I did not know the scholars my advisor named when he asked how I was doing on my Western legal history readings. As a good mentor should, Roger Nichols chastised and then charged me to read their works. Confronting genuine Western legal history felt much to me like meeting biological relatives who shared obvious and sometimes surprising resemblances without also inspiring affinity or attraction. It was a lonely feeling.

Although carefully researched and firmly stated, this scholarship by authors who fully embraced the Western legal history banner failed to consider the multiple categories of identity at play in courtrooms and capitolsthroughout the North American West, neglected to point out the statutory and social factors restricting marginalized actors’ entry into those sites of power, and drew conclusions about equity and opportunity that assumed law and its practitioners operated without prejudice, coursing steadily toward equality for Westerners even as individual members of society violated the law to ensure their own dominance. Often about Indians or Mexicans, sometimes about women, and almost always focused on violence, much of this literature could be found guilty of the charges made in Richard Delgado’s two-part essay on “Imperial Scholars”: these authors mostly cited one another and, with a few exceptions, failed to acknowledge the impressive work of women and scholars of color working on law in the North American West. They rarely chronicled Western legal histories of minority rights claims with any consideration of anticolonial or CRT insights that had clearly been established by the time I was reading and they were publishing in 2010. Such studies tend to offer judicial biographies, celebrating the deliverance of justice that frontier courts established or exposing the corruption and weakness of territorial law and order. Others elucidate the technical applications of particular statutes and tout the significance of remarkable cases, which is helpful in defeating the notion of a lawless West but not always helpful in illuminating the selective implementation of law and inconsistencies across the bench. Works that demonstrate this combination of careful research, inclusion of women and nonwhite actors, and a reluctance to offer a critical analysis of the legal system or the ways in which law codifies race and gender inequalities include Gordon Bakken’s Women Who Kill Men: California Courts, Gender, and the Press, which finds that the law
upheld justice for women who were defendants despite jurists’ gendered biases; Clare V. McKanna’s *Homicide, Race, and Justice in the American West, 1880–1920*, which argues that the West was a violent place and that defendants of color fared poorly in Western courts; and Bill Neal’s *From Guns to Gavels: How Justice Grew Up in the Outlaw West*, which concludes that the turn of the twentieth century brought increased reliance on courts of law rather than contests between men to settle Western disputes. 25

If you’ve been paying attention thus far, you should congratulate yourself for such stamina, but you should also see coming from a mile away that such works would not satisfy me or anyone else who had already benefited from the other scholars cited here. My advisor and I would agree that where their work directly overlapped with mine, I would need to take them into account, but that otherwise my own proclivities could guide my continued reading and so we plugged on to the defense. Clearly, we succeeded and in spring of 2011, I graduated, but even in my dissertation defense we could not decide which subfield my work occupied: Native, Western, or women’s history. All of those things at once, I insisted, and have since learned the publishing pitfalls of attempting. That no one asked whether it was a legal history indicates how far I still had to go before defining or claiming that elusive category for myself.

**Becoming Found in the Legal Borderlands of the North American West**

Offered an overwhelming and empowering postdoctoral fellowship at Southern Methodist University’s Clements Center for Southwest Studies, I sidestepped the Western legal history field once again and dipped more deeply into the borderlands studies that have now matured into a vibrant field of scholars with a range of specializations from nation-state formation to interracial intimacy to border crossing and policing. Among the many confessions buried in this essay is that my early dissertation focus on Indigenous and Latina studies and my narrow interest in the Southwest had shielded from my view borderlands scholarship on the Pacific Northwest and a growing critique of borderlands histories concentrating so squarely on the nation-state. Some authors had been part of my Western history training: Andrés Reséndez and Samuel Truett, for instance. Some books I had already read for their contributions to Western women’s history: *Writing the Range* and *One Step Over the Line*, particularly, but I now also turned to
those concerned with borders as a historical frame. In tandem with historiographic borderlands essays undoubtedly familiar to readers, I found that borderlands historians offered a wide range of options for someone seeking to apply anticolonial, critical, and feminist precepts to legal histories of the North American West. So, once again, I found myself floundering awkwardly in new historiographies that should not have been new to me at all and I felt the familiar flush of embarrassment and frustration that redheaded stepchildren know well. Thankfully, I found strong role models like Pablo Mitchell willing to share their wisdom with grace, and this is ultimately the turn that led me to legal borderlands.

Steve Aron and Jeremy Adelman’s 1999 essay asserts a firm limitation on borderlands as those zones marked by international boundaries. Those authors insist that without political context, “borderlands” loses meaning as a category of analysis and could become interchangeable with frontiers or otherwise diluted by misapplication. To fully consider such claims, I reread Andrés Reséndez and Samuel Truett, and followed up with Brian DeLay and Juliana Barr. I appreciated these authors’ efforts to articulate cultural and gendered, as well as political, aspects of the US-Mexico borderlands. Reséndez pointed to the border as a site where individuals of varying racial-ethnic backgrounds forged their national identities creatively; Truett connected borderlands politics to metropolitan influences and revealed border dwellers’ resistance to political boundaries that failed to reflect their personal cartographies of self-interest. DeLay exposed the shifting racial-ethnic and national alliances and animosities that allowed Americans to push the US-Mexican boundary further south and culminated in the military defeat of Comanches who had successfully manipulated the borderline as a shield and sword for over a century. Barr showed the importance of Indigenous women’s roles in colonial border crossings and exchange. Although each of these works seemed to begin their studies with Aron and Adelman’s assertion that political boundaries anchor borderlands histories, my readings left me more convinced that borderlands dwellers, including those who occasionally strayed far from national boundaries, carried their border characteristics with them well beyond the dividing lines that Anzaldúa described as open wounds. After also turning in this phase of my readings to the classic borderlands frameworks that Herbert Bolton established and David Weber refined, I remain convinced that their interpretations also leave room for this personal, as well as political, definition of borderlands.

As I continued working on my book, looking for evidence to answer the
question of how Indigenous women confronted the legal regimes Americans imported into Indian Country in the nineteenth century, I became more convinced of the utility of borderlands as a way to explain the personal boundaries between Indian women and newcomer citizens, the political boundaries between Indian and non-Indian lands, and the legal boundaries between Indianness and non-Indianness. Because many Indigenous women's legal claims stemmed from their crossing borders between Indian and non-Indian circles and between Indian and non-Indian lands, it seemed clear that the consequences of these personal choices stemmed from the political borders that transected their lives. Native women's legal histories reveal that Aron and Adelman's insistence on the fundamentally political significance of borders remains relevant, while Jameson and Anzaldúa's insistence on the personal and psychic aspects of border crossings also yields critical insights. Following the lead of those who have written expertly on the gendered and racialized cartographies of social and political borderlands, I have come to see the value in applying a familiar concept from women's history—the personal is political—to argue that where borderlands are concerned, the political is also personal. It is in the personal histories of borderlands dwellers that I am most able to appreciate the political nature of borders. Alicia Gutierrez-Romine's chapter on border-crossing abortion seekers models this dynamic beautifully. Expanding our conception of border zones to include the personal nature of national boundaries reveals the lines demarcating home and enemy territories, native and foreign lands and lives, the safe from the unsafe.

Reading Elizabeth Jameson's 2005 address at the annual meeting of the Pacific Coast Branch of the American Historical Association helped me comprehend the distinction between borders and borderlands:

National borders separate nations; their borderlands are places where social relationships cross those borders. Social borders erect social barriers, like those of race, for instance, while a parallel social borderland might be a zone or place where people of different races meet. Borders and borderlands can have multiple meanings; their significance usually differs for the various people they divide or connect. A border, for instance, can function both to exclude and protect. A national border can prevent certain people from entering a country; a social border can prevent people of different races or the same sexes from marrying each other. But borders can also function positively, to protect identity.
I'm not sure I've managed to follow all eight of the rules she offered for dancing through borderlands history, but I gained from Jameson's essay, and the works her footnotes pointed me toward, the confidence to see borderlands as permeating the lives of the women I've written about, even if some of them never crossed a national boundary.

With the luxury of time I did not fully appreciate in my pre-tenure-track years, I read on. My pursuit of borderlands historiography took me from the US-Mexican border to the US-Canadian border in an essential series of anthologies. I appreciated these authors' efforts to characterize borderlands histories in ways that highlighted identity—just as Anzaldúa had in her writings. Ken Coates suggested that "the study of borderlands presents a useful opportunity to examine the question of national (or regional) identity in its most highly focused form." Andrew Graybill and Benjamin Johnson characterized borderlands scholarship in four modes: "works that interrogate the implications of border-making for indigenous peoples," studies that "focus on the cross-border migrations of non-Aboriginal peoples [and] emphasize the exceptional permeability of the US-Canadian boundary," those that "examine the relationship of the border to the natural world that it bisects, a division no less capricious to ecosystems than to human populations," and a "collection of studies [that] analyze the impact of the border on the formation of national identity." In their collection, I especially appreciated essays that demonstrated borderlanders' construction of fluid identities and showed borders to be "places and ideas suited for cultural, intellectual, social, and political histories."

In turning away from Western legal history as a field that just didn't feel like home, I began to appreciate a more broadly defined conceptualization of borderlands as personal and political spaces that are more like zones than boundaries because they seemed more accurately to reflect the women whose histories make up my first book. Having Jeffrey Shepherd, Alexandra Harmon, and James Brooks as guest reviewers of my manuscript at the Clements Center proved especially helpful in making borderlands a recognizable frame in that project, even though my methodological thinking continues to evolve. If I am honest, I have to admit that I'm not actually satisfied with the way my first book considers or frames borders as a concept, mostly because it is still something I am working through, as this essay demonstrates. Certainly, some scholars crave a more narrowly defined borderlands approach focused on national and political borderlands and rooted more explicitly in the Spanish borderlands of the Bolton school, but there
are also those who have established a tradition of scholarship emphasizing the cultural and personal aspects of borderlands history. In fact, such a combined approach is exactly what legal borderlands and this volume offers.

Having gained deep appreciation for the benefit of applying intersecting historical insights to a borderlands frame, a continued search for interdisciplinary approaches to borderlands is what brought me to the legal borderlands school, announced in that 2005 special issue of *American Quarterly* like manna from heaven. Broken into sections entitled “Law’s Borders,” “Borders of Identity,” “Borders of Territory,” and “Borders of Power,” the essays demonstrated a powerful range of analysis that the legal borderlands frame allows, which this anthology expands upon. That I was reading the special issue at the same time Kelly Lytle Hernández gave a guest lecture at Southern Methodist University to accept the William P. Clements Prize for her book *Migrants: A History of the U.S. Border Patrol* made it impossible for me to overlook the connections between legal borderlands and borderlands historiography in the making.37

On first reading, guest editors Mary Dudziak and Leti Volpp’s introduction shot through me like a bolt of lightning and I was born again. Together, they tackled the definition of legal borderlands: “We might start with the role of law in borderlands that are geographic spaces. Borderlands can be contact zones between distinct physical spaces; they can be interstitial zones of hybridization. They can constitute spaces that challenge paradigms and that therefore reveal the criteria that determine what fits in those paradigms.”38 Dudziak and Volpp continued in characterizing the many facets of the legal borderlands concept: “Borderlands can also function not as literal physical spaces but as contact zones between ideas, as spaces of ideological ambiguity that can open up new possibilities of both repression and liberation. Legal borderlands can be physical territories with an ambiguous legal identity, such as US territories where the Constitution does not follow the flag.”39 The editors explained that the inherent ambiguity of legal borderlands “seems to render them sites of abnormal legal regulation, placing them on the edge of the law. But we can also draw upon the idea of legal borderlands to demarcate ideological spaces or gaps, holes in the imagining of America, where America is felt to be ‘out of place,’ contexts in which, in spite of American ideals of democracy and rights, violations of the law are routinized, such as in the space of the prison,” or the reservation, as some of our contributing authors explore in following chapters.40

What especially rang true for me as one still unsure about what was so
dissatisfying about Western legal history was Dudziak and Volpp’s critique that “the supposition that these spaces are exceptional, rather than the norm, enables the continued belief that ‘the story of America is the story of the rule of law,’ for stories of the violation of the rule of law are explained through their location in those physical spaces or their placement in those ideological gaps.” The chapters that follow make this tenet unmistakably clear. This application of the legal borderlands concept to argue against an assumption that law brings order and that the history of the North American West can be explained as a pursuit toward the rule of law seemed to articulate exactly my dissatisfaction with conventional Western legal histories that described disorder and injustice as anomalies increasingly resolved through the emergence of the nation-state and the hardening of political boundaries at the close of the nineteenth century.

All Hat and No Cattle: Distinguishing between Critical and Western Legal Histories

When I joined the Department of History at the University of Nebraska–Lincoln in 2012, I slowly began to return to the foundational debates and guidebooks I had skimmed while dissertating and I did what I assume all new faculty do in order to resolve lingering concerns: I taught what I did not fully understand. It would turn out for me that teaching the void in Western legal history proved more fruitful than simply contemplating that terrain, and I am grateful to the many undergraduate and graduate students who have participated in the discussions and exercises that propelled my own understanding. This reflective and exploratory process prompted me to reach out to Pablo Mitchell to partner in building this volume and occupied my thoughts as I attended Patty Limerick’s 2014 address at the Denver meeting of the American Society for Legal History. It also helped me to realize that the skepticism between critical and Western legal historians is mutual. Neither cohort is tremendously impressed with the other, it would seem.

What Western legal historians were putting down by 1988 that I did not pick up until nearly fifteen years later was a consensus on the legal arenas that characterized the North American West and therefore constituted the parameters of Western legal history. Defining Western legal history for the first time in an essay generated from a 1987 meeting of the minds hosted at Pepperdine University’s School of Law, John Phillip Reid described three areas of inquiry: (1) studies that applied general principles of American legal
history to the North American West; (2) legal histories particular to the West, such as “law of the Mexican borderlands, law of the Indian Territory, law on the California and Oregon trails, law of the cattle drives, law in the gold mining camps, the suppression of Mormon polygamy, and . . . water law”; and (3) depictions of a shared legal culture “directing, guiding, and even motivating nineteenth-century Americans,” Reid’s own area of interest. Readers should observe that our own chapters and notes draw on many of these histories as we examine topics familiar to Western legal historians.

Written just a year after Borderlands/La Frontera and Legacy of Conquest, Reid’s characterization of Western legal history nonetheless overlooked the problem of law as a system of power and conquest and embraced the Turnerian vision of rugged individualism reshaping an unoccupied frontier that so many other Western historians had already begun to turn against, making his field appear more resistant to revision than its practitioners would turn out to be. Although early Western legal historians embraced the law and society formulation of the law most commonly associated with Lawrence Friedman and his intellectual descendants—the law as reflective of society—they did not, broadly speaking, apply critical legal scholars’ interrogatory approach to the law. And some members, Gordon Bakken most notably, explicitly rejected the critical legal studies school on more than one occasion.

At the 1990 American Society for Legal History conference, Bakken outlined two problems in Western legal history and took a shot at critical legal scholars in the audience: “First, historians as well as present-day politicians have been ineffective in separating myth and reality. Second, on a historiographic level, professional historians have become mired in ideology, whether blinded by advocacy for Indians, Hispanics or Mormons, or strident attack upon these groups. . . . When Critical Legal Studies migrates beyond the Great Muddy, I am sure that it will do little to change this general condition.” Lawrence Friedman, Marion Rice, Christian Fritz, David Langum, and Harry Scheiber also joined Bakken on that roundtable. Friedman added his concern that Western legal history is perceived as “narrow and parochial.” He urged scholars of law in the North American West to “think of [themselves] . . . as a legal historian, plain and simple.” It is true that much of Western legal history has suffered from an overzealous pursuit of exceptionalism and regionalism, which might explain why legal historians outside of the North American West have been slow to incorporate our favored region in their otherwise rigorous scholarship. If many Western
legal historians remained Turnerian in their visions of the West as a region devoid of legal culture and practice prior to American settlement, then it is also understandable that New Western historians would turn away from such studies.

If nothing else, Bakken’s disdain for critical legal history proves the arrival of that method in the North American West, and yet, many Western historians struggle to define this approach to legal study succinctly. In Stanford Law Review’s 1984 special volume on critical legal studies, Robert Gordon distilled the assumptions and practices critical legal historians had developed over the previous decade.46 He offered “a seed catalogue or a Pocket Guide to the Common and Exotic Varieties of the Social/Legal Histories of North America.”47 Critical legal scholars blur the boundaries between law and society to argue that the law shapes and reifies social conditions. They argue that the law constitutes consciousness, or the assumption that what is legal is also right, thus demonstrating the cultural and ritual importance of law to determine natural order. Critical legal histories assert that the law is indeterminate and contradictory, or that the law is a “slippery sucker” as I like to tell my legal history undergrads, and scholars of law in the North American West can no doubt relate countless examples to affirm this precept. Critical legal historians argue too that the law is dialectic and present at all levels, borrowing a sort of history-from-below perspective from social historians to show that common and marginalized historical actors bring to bear their own legal perspectives and customs on the hegemonic systems shaped by elites and vice versa. Finally, critical legal projects ask a central question—“How does the law serve interests?”—that indicates their rejection of a benevolent or universal theory of law that suggests law is an objective and independent system that is applied equally to all. The contributors to this volume exhibit each of these precepts in their studies of legal borderlands in the North American West.

Readers might recognize some of these critical assumptions as rooted in the insights of Fanon, Foucault, Gramsci, and others and might wonder why familiar critiques of the law and hegemony require such extensive exposition. As recently as 2012, Southern legal historian Laura Edwards pointed out that few historians have in fact taken up these critical legal approaches to the legal regimes they write about: “Historians who are not legal historians tend to stumble when it comes to matters relating to law and the legal system . . . while critical tools brought them to legal sources, they did not always use those tools in their analyses of law and legal institutions.” She
suggested that “we need to transform our view of law and history—and put them together in new ways,” resulting in a lingering formalism in historians’ view of the law despite critical analysis in other areas of history. Speaking in regard to American legal historiography generally, Edwards described my own inkling that “the conceptual transformation proposed in [Gordon’s 1984 essay] has yet to materialize.”

I would argue the delayed “conceptual transformation” Edwards described is especially apparent in Western legal history and that without this critical transformation the scholars I so deeply admire will remain hesitant to claim affiliation with Western legal history. Historians who are otherwise deeply trained in the critical and sophisticated methods of other subfields often come to the legal archive accidentally and may not think of those sources in strategic ways. John Wunder noted this problem in his 1997 essay on the state of Western legal history ten years after its first organizing symposium: “One of the greatest myths in the writing and reading of American history is that legal history requires an understanding or training nearly impossible to attain. All too many historians of the American West have bought into this mythology, which consequently allows them to avoid the legal dimensions of human actions.” Perhaps not all scholars avoid the law so explicitly, but many superb Western historians who are critically minded do not apply legal evidence as effectively as they could even when it would serve their argument.

If archival misgivings might bar critical scholars from engaging Western legal history more directly, it is the reluctance—sometimes overt resistance—on the part of otherwise well-intentioned Western legal historians to critically read the law and its structures that puts Western legal history out of step with other scholarly dialogues. The trajectory toward a greater understanding of the expansion of American legal culture into the North American West and a search for the distinctive in Western legal history that scholars in the field put forward in the last decade of the twentieth century could hardly have appealed to anyone working in critical race studies, New Western, or critical legal history. And yet, the field showed promise, occasionally expanding its range as it slowly shed its Turnerian skin. That opportunity appeared in the watershed anthology Law for the Elephant, Law for the Beaver, published in 1992. John Reid threw down what Gordon Bakken called a “substantial scholarly gauntlet” in his lead essay, “The Lay­ers of Western Legal History.” In conjunction with “The Beaver’s Law in the Elephant’s Country: An Excursion into Transboundary Western Legal
History,” a companion article published the previous year in *Western Legal History*, these essays offered a refined articulation of Reid’s vision of Western legal history, which described the potential for a comparative view beyond American borders and employed the term “transboundary” to describe many of the phenomena discussed in this volume as “legal borderlands.”

Predisposed to a critical view of legal history by the time I first read *Law for the Elephant*, it was nonetheless affirming for me to read authors like Richard Maxwell Brown, Hamar Foster, John Wunder, and others in the collection who defined Western legal history as not only a particular subfield but also a sophisticated and worthwhile area of study. Reading *Law for the Elephant* allowed me to see an opening for the critical insights I first learned from Robert A. Williams’s work and the distinctive West I had encountered in Patty Limerick’s and others’ work. Of the essays most compelling to me in *Law for the Elephant*, Wunder’s stood out for its focus on anti-Chinese violence in the North American West. The combined attention to archival detail and systemic racism taught me the importance of reading territorial legal transcripts—not necessarily treaties, or even legislation, but local court records—with a critical methodology.

Perhaps because the community of Western legal historians remained divided in its stance toward other shifts in legal and Western history, *Law for the Elephant* went out of print while Western legal historians pursued further studies affirming the rule of law and the rise of law and order to tame the Wild West. In his 1997 essay, Wunder also asked whether there was “in fact a New Western Legal History, and, if so, does it represent a clear break from the past? Have American legal historians and New Western history proponents collaborated, or are they on parallel paths? And, finally, might there be something ‘old’ about the new legal history of the American West?” He offered an overview of debates in Western legal history and suggested that “there is no clear direction of Western legal history, but it is obvious that the New Western History has begun to penetrate the debate” and “that a New Western Legal History exists.” Like Friedman before him, Wunder urged readers to take more care in acknowledging their fledgling field because “there is, after all, drama to this story of law in the American West, and there is a general readership that wants to know about it.” Everyone in this volume agrees with that sentiment.

Writing ten years later, in 2007, Gordon Bakken surveyed the state of the Western legal history field at twenty years old, raising questions about
the nature of law in the American West that would also make it clear certain answers were unwelcome. Borrowing Limerick’s title phrase, Bakken suggested that “there was something in the soil in the West that made law different” and offered a review of promising scholarship examining law in the Western histories of mining, water policy, American Indians, Chinese immigration, women and gender, urbanization, environmental change, organized labor, and criminal justice, even as he took a swipe at critical legal historians when he paraphrased Howard Lamar: “Are the American people, particularly those who people the West, law-minded, as John Phillip Reid found on the overland trail, or is the law a tool of capitalistic oppression, as the critical legal studies school would have us believe?” Bakken concluded that “there is a lot to be done, but the field is now firmly established.”

Without applying analytical frameworks such as critical legal history, many territorial histories and judicial biographies chronicle important events but ultimately explain little about the dynamics of power and order in the North American West. Bakken’s disdain for theory is shared by many in his field, and much of the current Western legal scholarship is centered on characterizing the emergence of American legal tradition in the West, in elucidating but not interrogating many of the laws and opinions listed at the opening of this essay, and in tracing the peculiarities of Western legal history. While each of these studies fulfills their aim of chronicling the law, few consider the law itself as the object of scrutiny or seek to uncover the ways in which the law—and not merely its flawed human practitioners—has orchestrated inequality.

Nonetheless, some of the authors active in *Western Legal History (WLH)* and working across the professional boundaries dividing Western and legal scholars have offered promising works. Although this collection of essays fails to include coverage of legal histories particular to Asians in the North American West, such studies have appeared regularly in that journal since its first 1988 volume. Contributors to *WLH* have focused occasionally, if not always robustly, on gendered legal histories, while coverage of federal and state Indian policies and Native critiques of such laws has been consistently strong, and editors have always noted the importance of Spanish-colonial influence on legal practices in the Southwest while making room for studies of Latino and Chicano legal strategies. If there is often a teleological view of the rule of law and state formation in *WLH* articles, there are also many useful studies on the emergence of territorial and state jurisdictions...
and juridical practices that we all depend on in our own work. WLH is in the hands of a new editor after nearly twenty years and continues to publish a broad range of articles in the diverse subfields Wunder and Bakken noted. It has only recently become searchable through HeinOnline, and historians less familiar with that legal research database rarely consult or cite its volumes. In the shift to digital scholarship, that journal will hopefully reach its intended audience as it chronicles the rich legal histories of women, noncitizens, and racial-ethnic shapers of the North American West. Junior scholars should take note of the journal’s annual Jerome I. Braun Prize for best article when they consider venues for their work.

Bakken saw a bright future for Western legal history when he wrote in 2007, but there are signs the field has diminished in the decade since then, Limerick’s 2014 address at the American Society for Legal History among them. Other than the scholars gathered in this volume and the articles appearing in Western Legal History, there is little evidence of a lively dialogue between scholars in the Western History Association and the American Society for Legal History that began in 1987. Perhaps eschewing critical studies proved detrimental, since both of those organizations have effectively mainstreamed the innovations New Western and critical legal historians made in that decade. Where the University of Nebraska Press and the University of Oklahoma Press both once offered series in Western legal history, there is no longer an active series in that subfield. Bakken passed in 2015, mourned by many in our profession who felt the gift of his mentorship and constant support of junior scholars, but his foundational contributions to Western legal history will be remembered through his impressive bibliography. If Bakken proved unwilling to apply critical insights, there is still plenty of room for scholars to benefit from his foundational studies and expand the implications of the work he started. This volume takes up some of that landscape.

The persistent void between critical and Western legal histories is also tied to the too-early passing of Peggy Pascoe, whose 2009 book What Comes Naturally and the articles that preceded it exhibited all of the promise of an integration of critical legal studies and Western legal history and whose death a year later left a vacuum of mentorship that we continue to suffer from. In stark contrast to Bakken’s approach, Pascoe described the legal system imposed in the North American West as one steeped in white supremacist thinking and challenged contemporary scholars convinced that color-blindness offered a solution to racism and racialization in her
prize-winning study of miscegenation law throughout the American South and West in the nineteenth and twentieth centuries. Still mourned by many and irreplaceable to all, Pascoe and her work might have been in the audience’s mind during Limerick’s keynote at the 2014 Denver American Society for Legal History conference, modeling for audiences the merits of blending critical and Western legal histories that the legal borderlands frame promises. Despite the promise of Pascoe’s work for Western legal history, she is most widely cited among historians of race and gender who only tangentially identify as legal scholars. Many of the scholars in this volume are working steadily in the wake of Pascoe’s intellectual leadership.

Pascoe and Bakken’s scholarship covered the same terrain with a much different scope, Pascoe openly embracing critical legal precepts and Bakken frequently mocking them. What both scholars shared is a concern with close readings of the Western legal archive; they differed in their view of the law and its role in constructing or mediating inequality. Bakken’s autobiographical “Disclosure Statement and Acknowledgments” helps to explain his belief in law and order as one rooted in a midwestern and upwardly mobile Norwegian family history (our grandparents, it would seem, were very similar) and a view of legal history that reflects his training in the program Willard Hurst built in Wisconsin. Retaining the structural view of the law that Hurst’s school of thought espoused is paramount to invoking a Turnerian view of the West. Bakken’s works, and those who share his and Hurst’s realist view of the law, demonstrate a conviction that the law resolves the inequalities society creates. Pascoe’s work is more theoretically informed, challenging not only the notion that law is an objective and teleological force but also the assumption that gender and race are neutral or natural categories. Pascoe left no “disclosures” behind for us as Bakken did, but colleagues knew that Pascoe’s personal experiences shaped her work as much as Bakken’s or the work of any of the rest of us. According to Estelle Freedman, Pascoe’s “Western origins have infused everything she writes, as has her feminism.” The tensions between Bakken and Pascoe’s works are, as the scholars in this collection would agree, as much personal as they are political. They reflect the tensions in our collective fields, between those who favor Anzaldúa or Bolton, between those who are satisfied with recognizing a diverse West and those who still see a divided West, between those who apply theory and those who avoid it. We are the malcontents on the one side and the well intentioned on the other. We are not strangers to one another; we share conferences and review one another’s work all the
time. We all agree about the value and range of Western legal history, but many of us disagree about its meaning and utility. For some of us, this is a comfortable state of being.

Such tensions demonstrate to many what Western legal history is and is not, and redheaded stepchildren are nothing if not familiar with disputes between those they hold dear. My orientation to the occasionally tumultuous, but always thorough, Western legal history field did not convince me to join its gospel choir, but I nevertheless learned much about where and how to read the legal archives of the North American West more strategically and thoroughly from the field's proponents. It is in those archives that I hope to spend the remainder of my career with the ghosts and heroes cited in this essay.

Lest these last few pages seem to suggest an insurmountable rift in the blended family of Western historians concerned with race, gender, law, and order, readers should look forward to a set of essays that demonstrate the rich inheritance of ideas and training we collectively bear as the descendants of scholars whose legacies we embrace and resist. This volume is the result of a critical turn from the Western legal history fold thirty years after its founding. It is an indictment of that field's slow integration of the critical insights that we share as like-minded scholars seeking illuminating discussions of the law in the North American West. Our shared goal in navigating the void in Western legal history is to clarify the historical, intellectual, personal, and political landscape of legal borderlands rather than shrink from its vastness. Perhaps we are the blended family, gathered together in its thirtieth family reunion and still getting to know one another across conferences and publications; or perhaps we will remain "los atravesados: the squint-eyed, the perverse, the queer, the troublesome, the mongrel, the mulato, the half-breed, the half dead . . . those who cross over, pass over, or go through the confines of the 'normal.'" Either way, we have gathered here between these pages to lay down the law.

Notes

Epigraph: Gloria Anzaldúa, Borderlands/La Frontera: The New Mestiza (Aunt Lute, 1999), 24–25.

2. Mary L. Dudziak and Leti Volpp, introduction, "Legal Borderlands: Law and


10. Lauren Benton's work has since convinced me that those borderlands are a global phenomenon, but that realization came to me slowly and I did not read her work until 2011. Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (New York: Cambridge University Press, 2001), and *Legal Pluralism and Empires, 1500–1850* (New York: New York University Press, 2013) speak to legal questions relevant to the North American West even though they focus on global empires.
INTRODUCTION


43. Lawrence M. Friedman, “The Law and Society Movement,” *Stanford Law Review* 38, no. 3 (February, 1986): 773. Friedman described “the study of law and society, by whatever name,” as “something of a stepchild in the law school world.” The law and society movement Friedman described then is now a mainstream school of thought in legal history practice, as perhaps legal borderlands can become.
44. Gorden Bakken, in “Western Legal History: Where Are We and Where Do We Go From Here?” *Western Legal History* 3, no. 1 (Winter/Spring 1990): 115-116.
50. Wunder, “What's Old About the New Western History?” 92.
54. Wunder, “What's Old About the New Western History?” 87-88.
55. Wunder, “What’s Old About the New Western History?” 101, 112.
56. Wunder, “What’s Old About the New Western History?” 114.